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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
To: The Commission	)	

PETITION FOR RECONSIDERATION

Mobile Telecommunication Technologies Corp. ("Mtel"),[1] pursuant to Section 1.429 of the Commission's rules and Section 405 of the Telecommunication Act, hereby petitions for reconsideration of the Commission's Second Report and Order in CC Docket No. 96-128 (the "Second Report and Order").[2]

As set forth below, by its Second Report and Order, the Commission clearly erred in attempting to implement a "market based" pricing approach to implementing a "carrier pays" policy to provide compensation for pay telephone service providers ("PSPs")-- a policy that is itself flawed in concept. Chief among the Commission's errors were (a) a misunderstanding that the parties could negotiate an alternative price in view of the Commission's

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[1] Mtel has previously participated in this proceeding having submitted comments in response to the Commission's Public Notice of August 25, 1997 (DA 97-1673) inviting comment in response to the remand decision by the D.C. Cir., Illinois Public Telecommunications Ass'n v. FCC, 117 F 3rd 555 (1997).

[2] See, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order, FCC 97-371 (rel. Oct. 9, 1997), 62 Fed Reg. 58659 (Oct. 30, 1997).

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grant of a waiver to PSPs that effectively moots "blocking" as an option for those intermediate and end users who ultimately will be responsible for paying the charges; and (b) the calculation of what constitutes a "market price" for pay telephones.

ARGUMENT

I. The Commission's Rules are Premised Upon There Being a Realistic Blocking Alternative That Simply Does Not Now Exist.

When the D.C. Circuit upheld the Commission's "carrier pays" solution for PSP compensation for 1-800 calls, it did so only based upon the understanding that those parties who ultimately must pay for the calls will have some ability to decline the calls.[3] The Court specifically referenced and relied upon Commission pronouncements that the party who would have to pay for the call could avoid it, and would have some leverage "to negotiate for lower per-call compensation amounts".[4]

Relying on what the Commission had said, the Court reasoned as follows:

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[3] In so doing, the Court was responding to the eminently logical argument that the Commission's goal to create "a competitive payphone industry" cannot be squared with its election to utilize a "carrier pays" system because such a system "does not -- indeed cannot promote competition . . . . because the party causing the cost (the caller) does not have to pay for it, and the party incurring the cost (the carrier or, if the cost is passed on, the 800 service subscriber) has no way to decline it". Illinois Public Telecommunications Ass'n v. FCC, at 566.

[4] Id., citing to and quoting from the Commission's Order on Reconsideration in CC Docket No. 96-128, 11 FCC Rcd 21233 (1996) ("Order on Reconsideration").

> [s]ubscribers to an 800 service can utilize a carrier's call-blocking capability by negotiating with the carrier to block calls from payphones with excessive per-call compensation charges. *Order* ¶ 17. Further, as discussed above, we have determined that the Commission reasonably concluded that carriers can and will develop blocking technology. Thus, a "buyer" (the carrier or the 800 service subscriber) will have the option of rejecting a "seller's" (the PSP) excessively priced service.

Illinois Public Telecommunications Ass'n., at 566-67. Based upon the above, the Commission's "carrier pays" system was held not to be arbitrary and capricious. Id, at 567.

When the Commission issued its Second Report and Order, the Commission maintained its reliance upon the leverage that was established by virtue of its call blocking option. Specifically, the Commission explained that:

> [w]e also reject that use of a market-based compensation standard, in lieu of one that is cost-based, will overcompensate PSPs. The marketplace will ensure, over time, that PSPs are not overcompensated. Carriers have significant leverage within the marketplace to negotiate for lower per-call compensation amounts, regardless of the local coin rate at particular payphones, and to block subscriber 800 calls from payphones when the associated compensation amounts are not agreeable to the carrier.

Second Report and Order, at ¶ 97.

The Commission continued its reliance on "blocking" as a means to create reasonable leverage and thereby preclude PSPs being overcompensated by captive carriers despite action taken by the Commission's Common Carrier Bureau (the "Bureau") only two days prior to the release of the Second Report and Order. By that action, the Commission granted a waiver of the requirement that "LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they can receive per-call compensation from IXCs for subscriber 800 and access code calls".[5] The waiver, which was immediately applicable to an estimated forty percent of payphones for whom LECs have stated they are now unable to supply the requisite code digits, will extend until they attain such capability, but in no event beyond March 5, 1998. Id., at ¶ 8. Significantly, when it adopted the Second Report and Order, the Commission was well aware of the Bureau's Waiver Order,[6] and of the impact that the Waiver Order would have on the ability of IXCs to block calls.[7]

The Commission's sole reference to the Waiver Order in its Second Report and Order was in the context of a mere acknowledgment. There was no discussion of how the waiver would impact on the equities or logic behind carrier pays, and the Commission stated only that:

> [t]his limited waiver was granted by the Bureau to afford LECs, IXCs, and PSPs an extended transition period for the provision of payphone-specific coding digits without further delaying the payment of per-call compensation as required by Section 276 of the Act and this order. The Bureau made this

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5 Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order, DA 97-2162 (Com. Car. Bur. Oct 7, 1997), at ¶ 8 ("Waiver Order").

6 Second Report and Order, at ¶ 5.

7 Waiver Order, at ¶ 13.

> limited waiver effective immediately in order to ensure that PSPs receive per call compensation beginning October 7, 1997.

Second Report and Order, at ¶ 5.[8]

The Commission's inattention and apparent indifference to the Waiver Order renders the Second Report and Order arbitrary and capricious. Clearly, the Commission has not complied with its obligation to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[9] Nor has it met its obligation to assure that "all the relevant factors and available alternatives were given adequate consideration".[10] Thus, the Commission failed to comply with its threshold obligation to articulate with reasonable clarity its reasons for its decision and identify the significance of the crucial facts.[11] In fact, here

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[8] In the Waiver Order, not the Second Report and Order, the Bureau explained only that "[i]n light of this [Section 276] mandate, we conclude that the potential harm from the absence of compensation to PSPs would be greater than the potential harm to IXCs from the inability to block certain payphone calls before March 9, 1998". This is the very type of "mere collection of conclusory comments" that reviewing courts will not sustain. See, West Michigan Telecasters, Inc. v. FCC, 396 F. 2d 688, 691 (D.C. Cir. 1968).

[9] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[10] Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413, 1426 (D.C. Cir. 1983) ("Church of Christ").

[11] See, e.g., Section 557(c) of the Administrative Procedure Act, 5 U.S.C. Section 557(c), which provides that all decisions shall contain findings, conclusions and reasons

the Commission did not really take the required "hard look" at the salient problems, or engage genuinely in reasoned decision making.[12] It simply re-adopted its prior decision, notwithstanding there being critical intervening developments.

II. The Commission Erred In Calculating a Default Per-Call Rate.

In its Second Report and Order the Commission established a default per-call rate of 28.4 cents, which rate will be in effect for two years. Second Report and Order, at ¶ 117. After that time, the "fair compensation" rate mandated by Section 276 of the Act shall be the deregulated market rate for a local coin call, adjusted for costs. The default rate was based on a perceived "market" rate of 35 cents, and a reduction of 6.6 cents, to reflect "cost differences". Id.

In setting its default rate, the Commission did nothing more than start with the 35 cents market-based coin rate established in its Order on Reconsideration in this proceeding, and then adjust that rate to, (a) remove coin-related costs; and (b) add costs specific to subscriber 800 and access code calls. Second Report and Order, at ¶ 29.

Based on the above, the Commission's analysis was limited to calculating the cost additions and subtractions associated with the

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for all material issues of fact, law or discretion. See, also, Charles H. Koch, Jr., Administrative Law and Practice, 2nd Edition, Westlaw, Section 5.62.

12 See, Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 851 (D.C. Cir. 1970).

differences between coin calls and coinless calls. In so doing, the Commission did not heed fully the Court's prior admonition that, "[t]he FCC failed to respond to any of the data showing that the costs of different types of payphone calls are not similar" or that, "[t]he critical point here is that the FCC has failed to justify tying the default rate to local coin rates". Illinois Public Telecommunications Ass'n, at 564.

In response to the partial remand by the D.C. Circuit, the Commission was presented with considerable argument and data demonstrating that the proper rate for a market based local coin call is not the 35 cents previously determined by the Commission, and that in any event, the cost of 1-800 calls varies so widely that the "one size fits all" approach adopted by the Commission is not here reasonable. See, e.g., those several comments referenced in the Second Report and Order, at n. 180 arguing that the Commission should establish a default per-call termination rate, rather than adopting a surrogate rate. In its Reply Comments, WorldCom urged the Commission to adopt a blended rate that reflects estimated payphone costs proffered by a number of commenters. WorldCom Reply Comments, at 4-5. See, also, arguments of AT&T and Sprint that, if the Commission is determined to start with a local coin rate, it should be the 16.7 cents submitted by New England Telephone before the Massachusetts DPU. The Commission was also presented with data demonstrating that, whatever the average charge for a 1-800 call should be, it should not be the same for all calls. See, e.g., the presentation by Paging Network, Inc.

(September 22, 1997) demonstrating that 1-800 paging calls last, on average, only 10 percent as long as access code calls. With the average access code lasting approximately five minutes, and the average numeric messaging call lasting only a matter of seconds, the discrepancy in call length was, if anything, underestimated by those comments.

The Second Report and Order provides no reasoned analysis for not accepting any of the above arguments, or even giving them due consideration. The mere acknowledgement that these arguments were presented is not sufficient to cause any Commission action to be defensible. See, Alltel Corp. v. FCC, 838 F 2d. 551, 558 (D.C. Cir. 1988).[13] Here, where in discussing the case, the D.C. Circuit discussed its general practice when there is "little or no prospect of the rules being readopted upon the basis of a more adequate explanation of the agency's reasoning", the lack of any further analysis on the agency's part particularly undermines its defensibility.[14]

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[13] See, also, Motor Vehicle Mfrs, supra, n. 9. (When making a decision the FCC must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and choice made'.") See, Also, Church of Christ, supra, n. 10. (Only where "all relevant factors and available alternatives were given adequate consideration" can a Commission decision be upheld.)

[14] See, Illinois Public Telecommunications Ass'n v. FCC, 123 F 3rd 693, 693 (D.C. Cir. 1997).

CONCLUSION

For all the foregoing reasons, Mtel respectfully requests the Commission to reconsider its Second Report and Order consistent with the above comments. Only by so doing will the Commission be able to implement the Congressional mandate to establish a more competitive pay telephone industry.

Respectfully submitted,

Mobile Telecommunication Technologies Corp.

By: ____________________
Thomas Gutierrez
J. Justin McClure

Its Attorneys

Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 857-3500

December 1, 1997